(4)

No. 99-1904

Supreme Court, U.S.
FILED
JUL 12 2000
CLERK

In The

Supreme Court of the United States

I&M RAIL LINK,

Petitioner,

v.

NORTHSTAR NAVIGATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

CARTER G. PHILLIPS
VIRGINIA A. SEITZ
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

WESTON W. MARSH*
MICHAEL J. SCOTTI, III
FREEBORN & PETERS
311 South Wacker Drive
Suite 3000
Chicago, IL 60606-6677
(312) 360-6000

Counsel for Petitioner

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI 1

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Alamo Barge Lines, Inc. v. *Rim Maritime Co.*, 596 F. Supp. 1026 (E.D. La. 1984) 8

Central Rivers Towing, Inc. v. *City of Beardstown*, 750 F.2d 565 (7th Cir. 1984) 8

Folkstone Maritime, Ltd. v. *CSX Corp.*, 64 F.3d 1037 (7th Cir. 1995) 7

Lauritzen v. *Chesapeake Bay Bridge & Tunnel Dist.*, 259 F. Supp. 633 (E.D. Va. 1966) 8

Rodi Yachts, Inc. v. *National Marine, Inc.*, 984 F.2d 880 (7th Cir. 1993) 8

Seaboard Airline R.R. v. *Pan Am. Petroleum & Transp. Co.*, 199 F.2d 761 (5th Cir. 1952) 9

Texas & Pac. Ry. v. *Angola Transfer Co.*, 18 F.2d 18 (5th Cir. 1927) 9

The Oregon, 158 U.S. 186 (1895) 1

United States v. *Illinois Terminal R.R.*, 501 F. Supp. 18 (E.D. Mo. 1980) 8

Wilmington Ry. Bridge Co. v. *Franco-Ottoman Shipping Co.*, 259 F. 166 (4th Cir. 1919) 8

STATUTES

33 U.S.C. § 401 1

33 U.S.C. §§ 511-523 1

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

On May 5, 1997, when respondent's towboat struck the Sabula Railroad Bridge, the Bridge was in full compliance with its Coast Guard permit. The Bridge was first permitted by the United States government in 1880. It remains in compliance today. Indeed, on April 26, 1996, the Coast Guard renewed the Bridge's permit; and on May 1, 2000, the Coast Guard confirmed that the April 26, 1996 permit " ' . . . is valid and there is no action pending that requires a permit amendment.' " Pet. 7 (omission in original).

This Court's decision in *The Oregon*, 158 U.S. 186, 197 (1895), reaffirmed the common rule of admiralty that when a moving vessel allides with a stationary vessel or bridge, it is presumed that the stationary object was not at fault and that the moving vessel caused the allision. Until the court of appeals decision in this case, this presumption applied with full force where, as here, a moving vessel allides with a bridge that is in compliance with a Coast Guard permit. In the decision below, however, the Seventh Circuit held that the Sabula Bridge is not entitled to any beneficial presumption by virtue of its current and valid Coast Guard permit, because the Coast Guard had simultaneously found that the Sabula Bridge qualified as an "unreasonable obstruction to navigation" such that it was entitled to receive federal funds for bridge alteration under the Truman-Hobbs Bridge Act. See 33 U.S.C. §§ 511-523. The court believed that the Coast Guard's Truman-Hobbs findings trumped the Agency's concurrent finding embodied in the permit that the Bridge was "lawful." See 33 U.S.C. § 401. Thus, the court held, "[t]he trier of fact must give an answer [to the question whether the Sabula Bridge is legally liable for the allision at issue] *without resort to presumptions.*" Pet. App. 8 (emphasis supplied).

Plainly, the Coast Guard, which has authority both to permit bridges and to make Truman-Hobbs determinations, has harmonized the two statutory schemes that it is charged with administering. For decades, its determination that a bridge was "lawful" under section 401 has entitled the bridge both to a permit and to the beneficial presumption of *The Oregon* Rule when an allision occurs. Nothing in the history of the Truman-Hobbs Act or in the Coast Guard's administrative proceedings under that Act gives any indication that the findings prerequisite to federal funding for bridge alteration may be used to deprive a bridge of its lawful, permitted status and the common sense benefits conferred upon lawful stationary objects by *The Oregon* Rule. Nor has the Coast Guard ever taken any action that would allow the inference that Truman-Hobbs proceedings can bear such weight. Moreover, if bridge owners had believed that a Truman-Hobbs finding could sweep away *The Oregon* Rule presumption in maritime negligence cases, they would have battled mightily to avoid such a determination; yet Truman-Hobbs proceedings have never been truly adversarial.[1] Finally, the Coast Guard clearly did not consider its Truman-Hobbs findings binding in its May 1, 2000 decision that the Sabula Bridge is lawful in its present condition.[2] If the

---

[1] Respondent claims that Truman-Hobbs proceedings are adversarial, citing the statutory language providing for a hearing and an appeal. *See* Opp. 11-12. This misses petitioner's point which is that these hearings generally are not contested, adversarial proceedings, but rather inquiries to determine whether federal funds should be used to alter a bridge. If federal funds came to a bridge accompanied by loss of *The Oregon* Rule presumption, bridge owners would seek to decline this "benefit," particularly since the money generally is not forthcoming for many years.

[2] The Opposition states (Opp. 12) that the Sabula Bridge permit required its owners to modify the Bridge if it became an unreasonable obstruction to navigation. Yet the Coast Guard's

Coast Guard permit is to be deprived of its established meaning and consequence, it is for the Coast Guard, which is charged with administering both the permitting and the Truman-Hobbs schemes, to say so. Yet the Agency's actions support the contrary conclusion.

We showed in the petition that the court of appeals' decision – that a Truman-Hobbs finding deprives a permitted bridge of its lawful status – is contrary to established admiralty law, ignores the purposes of the relevant statutory schemes, and conflicts with the decisions of other courts of appeals. In addition, we showed that because numerous bridges have received the Truman-Hobbs designation, the court of appeals' new rule will cause widespread harm. It will generate substantial litigation about the relative fault of lawfully permitted bridges and moving vessels in allisions; it will convert the presently non-adversarial Truman-Hobbs proceedings into pitched battles; and it will reduce vessel owners' and operators' incentives to make the most prudent navigational decisions and safety-related investments. For all of these reasons, this Court should grant the petition. In this reply, we respond briefly to respondent's unsuccessful attempts to show that review is unwarranted.

1. Respondent first seeks to persuade the Court that it is, indeed, difficult to navigate through the Sabula Bridge and, therefore, that it would be somehow unfair in this case to presume that a moving vessel approaching the stationary bridge is at fault. See, *e.g.*, Opp. 1, 3-4. There is no doubt that safe navigation of a Mississippi River bridge by a large group of vessels requires skill and judgment, and that the increasing size of vessels seeking

---

May 1, 2000 decision required no modifications for the Bridge to maintain its lawful permit. Clearly, the Coast Guard does not deem the Bridge an unreasonable obstruction to navigation in any sense other than that required to support the use of federal funds in its alteration.

to navigate the River has exacerbated the inherent difficulties. That is, in part, why the Coast Guard must permit all bridges over the navigable waters of the United States. But the relative difficulty of navigating the Sabula Bridge is not the issue before this Court. The petition presents the purely legal question whether the Coast Guard's issuance of a permit to a bridge establishes the prerequisites for the invocation of *The Oregon* Rule or whether that Coast Guard's simultaneous determination that a bridge should be altered under the Truman-Hobbs Act rebuts the presumption of fault, by itself, and allows the question of negligence to go to the trier of fact. Put differently, the question is whether the Coast Guard's Truman-Hobbs findings and decisions are admissible in a maritime negligence case. This is a pure question of statutory construction that the court of appeals decided incorrectly.

2. Respondent next observes that the petition is interlocutory. That point plainly does not militate against review here for several reasons.

First, the entire point of *The Oregon* Rule and the common sense presumption of fault it establishes is to avoid costly and lengthy trials of comparative negligence where a moving vessel allides with a lawful stationary object such as a permitted bridge. Even if petitioner prevails at trial, it will not have avoided the harm caused by the court of appeals' decision; *viz.*, the loss of the presumption that the moving vessel was at fault in the allision.

Second, the rule of law imposed by the Seventh Circuit mandates trials whenever moving vessels strike permitted bridges that are also the subject of a Truman-Hobbs finding. It is this legal rule that petitioner challenges. The unquestionably time-consuming and expensive trial of relative fault in this case will add nothing of relevance to this Court's review of the question whether Truman-Hobbs findings are material in a maritime negligence case.

Third, for the reasons stated in the petition, there is substantial harm in allowing the Seventh Circuit's decision to stand. The opinion will encourage trials about the comparative negligence of moving vessels and bridges that are entitled to Truman-Hobbs funds (currently 13 bridges which have experienced over 2,000 allisions in the past ten years, Pet. 9). It may subtly increase risk-taking and reduce safety investment.[3] It also will alter entirely the character of Truman-Hobbs proceedings. In sum, there are good reasons to decide this question now.[4]

3. Respondent further argues that the court of appeals' decision will promote safety "by compelling

---

[3] Respondent characterizes the argument that river boat pilots will be less careful under the court of appeals' rule as "sophistry." Opp. 7. In so doing, respondent takes a sophisticated argument, oversimplifies it, and knocks it down. Of course, pilots will do their best safely to navigate bridges, all other things being equal. But boat owners and operators will not have the same financial incentives to maximize safety, and this will show up in navigational decisions at the margins (i.e., whether to attempt to navigate a bridge during a particular wind or other under less optimal circumstances or to incur the costs of delay, or whether to invest in a certain safety-related technology or save its cost). It is naïve to say, as respondent does, that the elimination of the presumption of fault will not have adverse consequences for safe navigation of bridges.

[4] Respondent also suggests that, even apart from the Truman-Hobbs findings, it presented sufficient evidence to rebut *The Oregon* Rule. The court of appeals' opinion contains no hint of such a finding, and plainly reversed the district court's grant of summary judgment solely on the ground that the Truman-Hobbs findings rebutted the presumption that the moving vessel was at fault. The district court expressly held that "[d]efendants have also failed to rebut the presumption of negligence with evidence that the ship acted with reasonable care." Pet. App. 11. This argument is a red herring designed to distract the Court from the purely legal question presented by both lower courts' holdings.

Petitioner to rectify the extreme dangers posed by its bridge." Opp. 7. This argument simply ignores both the permit process of 33 U.S.C. § 401 and the purposes of the Truman-Hobbs Act, which respondent, of course, invokes when more convenient to its needs.

The Sabula Bridge is lawful pursuant to a Coast Guard permit. Under the statute, any alteration to its design must be approved by the Coast Guard. If the Bridge, in fact, posed an extreme danger, the Coast Guard would not permit it without requiring alteration. But, the Coast Guard has confirmed as recently as May 1, 2000 that the Bridge has a lawful permit *in its current condition*.

Moreover, as Congress recognized, alterations to railway bridges to accommodate the needs of modern commercial marine shippers do not serve the interests of the railroads that own them, but rather the interests of their competition. Congress further understood that the Federal Government has an interest in supporting the continued viability of railroads and avoiding the abandonment of railway bridges and hence rail lines. Based on concerns of fairness and in order to encourage bridge improvement without bankrupting railroads, Congress passed the Truman-Hobbs Bridge Act, which provides that the Federal Government will fund bridge improvements in significant part. See Pet. 22-27. In short, Congress has determined that *this scheme* (not individual negligence actions) is the balanced way to encourage improvements to bridges over navigable waters in the United States. Using a Truman-Hobbs finding to deprive a lawful, permitted bridge of the benefit of *The Oregon* Rule would strongly discourage bridge owners from using the Truman-Hobbs process.

Petitioner, like most owners of Truman-Hobbs bridges, is awaiting the federal funding necessary to make feasible the alteration of the Sabula Bridge. Until that point, the Coast Guard, pursuant to Congress' scheme, has determined that the Sabula Bridge is lawful,

and that Agency determination should apply in maritime negligence actions.

4. Respondent clumsily attempts to recast petitioner's argument as a contention that the Coast Guard permit "forever immunizes a bridge owner from any form of liability." Opp. 8. That is not even a remotely accurate description of either our argument or the facts. The Coast Guard re-permitted the Sabula Bridge on April 26, 1996, a year prior to the allision in question, and reconfirmed the validity of the permit on May 1, 2000. The Bridge was, accordingly, lawful and entitled to the benefit of *The Oregon* Rule at the time of the allision. Petitioner is not seeking "the blind imposition of liability against a vessel" that collides with a stationary object. *Id.* at 10. Petitioner seeks only a presumption that, as a lawful, stationary object engaged in no action (such as the lifting of a drawspan), the fault for any allision lies with the moving vessel. This presumption is deeply and firmly rooted in admiralty law and should have been applied in this case.

Similarly inapt is respondent's citation of cases standing for the proposition that a bridge owner cannot invoke *The Oregon* Rule if the permitted bridge is in violation of its permit or another law. See Opp. 8-9, 14-15. In the first cited case, the permitted bridge had not been passive, but had taken action that was not in compliance with its permit and thus removed *The Oregon* Rule presumption. See *Folkstone Maritime, Ltd.* v. *CSX Corp.*, 64 F.3d 1037, 1055 (7th Cir. 1995) (failure of the bridge to elevate to its fully-open 83 degree angle *in violation of its permit* was the sole proximate cause of the allision).[5] Most

---

[5] Respondent also states incorrectly that the Sabula Bridge was not in compliance with its permit. *See, e.g.*, Opp. 12-13. Neither lower court so much as hinted that this was true, and the Coast Guard's May 1, 2000 determination is directly to the contrary.

of the citations similarly involve stationary objects in violation of the law; none involves a lawfully permitted object. See *Central Rivers Towing, Inc.* v. *City of Beardstown*, 750 F.2d 565, 568-73 (7th Cir. 1984) (holding that the city government and the United States could be liable for an accident caused by remains of bridge destroyed pursuant to government specifications if the ruins of the bridge were negligently maintained); *Alamo Barge Lines, Inc.* v. *Rim Maritime Co.*, 596 F. Supp. 1026, 1033 (E.D. La. 1984) (holding a stationary vessel liable for an allision where the vessel was illegally anchored in midchannel); *United States* v. *Illinois Terminal R.R.*, 501 F. Supp. 18, 20 (E.D. Mo. 1980) (holding that although a bridge was lawfully erected, its decaying remains were an unlawful obstruction not " 'affirmatively authorized by Congress' "); *Lauritzen* v. *Chesapeake Bay Bridge & Tunnel Dist.*, 259 F. Supp. 633, 635, 638 (E.D. Va. 1966) (holding that a state agency may be liable in admiralty law for a vessel's allision with an underwater obstruction in violation of building permit conditions and navigation laws). Cf. *Wilmington Ry. Bridge Co.* v. *Franco-Ottoman Shipping Co.*, 259 F. 166, 168-71 (4th Cir. 1919) (applying *The Oregon* Rule in favor of the bridge, but holding that the vessel had used due care and thus was not liable for the allision).[6] In contrast here, the Bridge was in full compliance with its Coast Guard permit and thus "lawful," and the lower courts found that the vessel failed to rebut the presumption of *The Oregon* Rule.

5. Finally, respondent's arguments that this case does not create a decisional conflict among the lower courts are entirely without merit.

---

[6] In the remaining case cited, *Rodi Yachts, Inc.* v. *National Marine, Inc.*, 984 F.2d 880 (7th Cir. 1993), the court applied not *The Oregon* Rule, but rather the "drifting-vessel presumption," and simply questioned whether the rule was a "sensible observation" or a "presumption." *Id.* at 886.

Respondent first asserts that *Seaboard Airline Railroad* v. *Pan American Petroleum & Transport Co.*, 199 F.2d 761 (5th Cir. 1952), cannot create a conflict because the court of appeals decision does not mention the Truman-Hobbs Bridge Act by name. As we pointed out, however, the district court plainly stated that the bridge at issue was the subject of an order to alter under the Act. Pet. 27 n.5. The court of appeals held that this order was insufficient to rebut the presumption of *The Oregon* Rule, as applied to an allision between a stationary bridge with a valid permit and a moving vessel.

Respondent next tries to distinguish this case from *Seaboard Airline* on the ground that there was a trial in the latter case. That signifies only that the defendant vessel had evidence *other than the Truman-Hobbs finding* to support its denial of fault for the allision. Here the lower court properly found that the vessel had not presented other evidence to rebut *The Oregon* Rule. See *supra* note 4.

Finally, respondent argues that *Seaboard Airline* rests on a discredited "active-passive" negligence doctrine that has been displaced by the doctrine of comparative negligence. This contention, assuming its validity, would not alter the legal holding of *Seaboard Airline* – to wit, that a Truman-Hobbs order to alter does not rebut the presumption embedded in *The Oregon* Rule. The application of the doctrine of comparative evidence would change only the calculation of damages in *Seaboard Airline*, and even that effect would arise only if the vessel were able to show that the bridge was somehow responsible for the allision. It would not vitiate the conflict between the instant case and *Seaboard Airline* in the slightest.

Finally, in attempting to distinguish *Texas & Pacific Railway* v. *Angola Transfer Co.*, 18 F.2d 18 (5th Cir. 1927), respondent asserts that it could not be a true conflict because the Truman-Hobbs Act was not in effect at that time and because the bridge at issue had not been declared unlawful. Opp. 15-16. This argument misses the

point. The bridge at issue in *Angola Transfer* was built pursuant to a congressional authorization, according to plans and specifications approved by the Secretary of War; at a later date, an administrative official issued an order to renovate the bridge. The court held that approval of the construction insulated the bridge owner from allegations that the bridge was improperly constructed, despite the subsequent administrative order to renovate. Similarly here, the current Coast Guard permit makes the Sabula Bridge lawful, and that lawfulness is not affected by the Coast Guard's simultaneous issuance of a decision that the bridge is qualified to receive federal funds for alteration under the Truman-Hobbs Act.

This conflict among the courts of appeals and, indeed, on the Mississippi River itself, warrants review of the decision at issue.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS
VIRGINIA A. SEITZ
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

WESTON W. MARSH*
MICHAEL J. SCOTTI, III
FREEBORN & PETERS
311 South Wacker Drive
Suite 3000
Chicago, IL 60606-6677
(312) 360-6000

Counsel for Petitioner

* *Counsel of Record*